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Supreme Court, U.S.
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No.

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JOSHUA J. PRATCHARD
LANCE CORPORAL, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces*

PETITION FOR A WRIT OF CERTIORARI

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Article 10 of the Uniform Code of Military Justice (UCMJ) states that if a service member "is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Due to the unreasonable delay in his case, Petitioner made a motion to dismiss under Article 10, UCMJ. The military judge denied the motion. After his conviction, Petitioner appealed the military judge's ruling to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). Exercising its wide discretion to review both facts and law, the NMCCA held that the issue was waived by Petitioner's unconditional guilty pleas. But the NMCCA then stated, in dicta, that even if the issue was not waived, an Article 10, UCMJ, violation did not exist. Upon further appeal, the Court of Appeals for the Armed Forces (CAAF), exercising its limited jurisdiction, overturned NMCCA's decision and held that Petitioner did not waive his right to appeal the Article 10, UCMJ, issue. But then the CAAF conducted its own *de novo* review and held that an Article 10, UCMJ, violation did not exist.

QUESTION PRESENTED

Does Article 67, UCMJ, give the Court of Appeals for the Armed Forces jurisdiction to review a factual and legal issue *de novo* after it overturns a service court's holding that a review on the issue was waived and if a factual and legal review of the issue has not been properly conducted by that service court?

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JOSHUA J. PRATCHARD
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v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces*

PETITION FOR A WRIT OF CERTIORARI

Lance Corporal Joshua J. Pratchard, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on June 15, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces is published at 61 M.J. 279 (C.A.A.F. 2005). App. A, *infra*, at 1a. The opinion of the Navy-Marine Corps Court of Criminal Appeals, is at No. 200301258, slip op. (N-M. Ct. Crim. App. May 18, 2004). App. B, *infra*, at 2a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on June 15, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1259 (3).

CONSTITUTIONAL PROVISIONS

The pertinent portion of Art. I, § 8 reads:

The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

The Fifth Amendment to the Constitution reads, in part:

No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

STATUTORY PROVISIONS

10 U.S.C. § 810 reads, in part:

When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

10 U.S.C. § 866(c) states:

In a case referred to it, the Court of Criminal

Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

10 U.S.C. § 867 (c) reads, in part:

In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals . . . The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

STATEMENT OF THE CASE

Petitioner was tried before a general court-martial composed of a military judge alone on March 20, 2002. Pursuant to his pleas, Appellant was convicted of wrongful use of a controlled substance and wrongful distribution of a controlled substance in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

Petitioner was sentenced to confinement for three years, a reduction in rank to the lowest enlisted pay grade, forfeiture of all pay and allowances, and to be discharged from the

military with a bad-conduct discharge. The commanding officer authorized to convene the general court-martial (the convening authority) approved the sentence, but suspended all confinement in excess of thirty months pursuant to a pretrial agreement. Except for the bad-conduct discharge and the confinement in excess of thirty months, the sentence was ordered executed.

On May 18, 2004, the NMCCA affirmed the findings and sentence as approved by the convening authority. *United States v. Pratchard*, No. 200301258 slip op. (N-M. Ct. Crim. App. May 18, 2004). The CAAF exercised its discretionary jurisdiction to consider Petitioner's appeal, and held that the NMCCA had erred when it determined that Petitioner had waived his right to appeal the Government's violation of his speedy trial rights under Article 10, UCMJ. But then the CAAF reviewed Petitioner's Article 10 issue *de novo* and affirmed NMCCA's decision. *United States v. Pratchard*, 61 M.J. 279 (C.A.A.F. 2005).

REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests that this Court grant his petition and either summarily reverse his case or set it for briefing and argument.

Although the CAAF overruled the NMCCA's holding that Petitioner had waived his right to a speedy trial appeal under Article 10, UCMJ, it then erroneously reviewed Petitioner's case *de novo* without first remanding it back to the service court for a proper review under Article 66, UCMJ. Under its powers pursuant to Article 67(c), UCMJ, the CAAF is a court of limited jurisdiction and it cannot review Petitioner's case unless the case has first been properly reviewed by one of the service courts of criminal appeals. While the service court

stated, in dicta, that there had not been an Article 10, UCMJ violation, that finding was compromised by its controlling opinion that an Article 10, UCMJ, appeal was waived. Therefore, the CAAF did not have a valid jurisdiction on which to base its *de novo* review.

Thus, the rights of service members are whittled away because their cases fall short of the intended comprehensive review under Article 66(c), UCMJ. This Court's review is therefore warranted.

ARGUMENT

After determining that Petitioner did not waive his speedy trial appeal under Article 10, UCMJ, the Court of Appeals for the Armed Forces exceeded its jurisdictional power by deciding Petitioner's case *de novo*; the court should have remanded Petitioner's case back to the Navy-Marine Corps Court of Criminal Appeals so that it could determine if there was an Article 10, UCMJ, violation.

The jurisdictional power of review that service courts possess under Article 66(c), UCMJ, is an "awesome, plenary, *de novo* power of review" that allows a service court to substitute its judgment for that of the military judge and court members. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). The CAAF has stated that, "A clearer *carte blanche* to do justice would be difficult to express." *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991). This great power was legislated by Congress in order to combat the prevailing unlawful command influence and excessive sentences that existed in the military. See, e.g., *Hearings on H.R. 2498*

Before the Subcomm. Of the House Armed Services Comm. On the Uniform Code of Military Justice, 81st Cong., 1st Sess. 597 (1949); Roger M. Currier & Irvin M. Kent, *The Boards of Review of the Armed Forces*, 6 VAND. L. REV. 241-242 (1952-1953).

In contrast, Article 67, UCMJ, which curtails the CAAF to "matters of law", limits the jurisdictional power of review that the CAAF possesses. This Court has recognized the limited power of the CAAF under statute. See *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (reversing the CAAF for exceeding its jurisdictional power). The CAAF itself has recognized its limitations. See, e.g., *United States v. Sanders*, 37 M.J. 116 (C.M.A. 1993) (recognizing that it had no authority to assess the credibility of witnesses).

Thus, on appeal, a service member's best chance for review of all factual and legal evidence is at the service court level, due to their immense power of review. Petitioner's case was reviewed by the NMCCA under Article 66, UCMJ, and the court determined that Petitioner had waived his right to appeal a speedy trial issue under Article 10, UCMJ. *Pratchard*, No. 200301258, slip op. at 2. But in the next paragraph of its decision, the NMCCA, in dicta, stated that "even if" the issue was not waived, there was no Article 10, UCMJ violation. *Id.* It is upon this "even if" dicta that the CAAF can claim its jurisdiction to review Petitioner's case *de novo*.

Without the NMCCA dicta, the CAAF would not have had a basis on which to further review Petitioner's case after it answered the question of whether the Article 10, UCMJ, speedy trial issue was waived. However, such a basis, based on dicta, is not enough under this Court's interpretation of the CAAF's jurisdictional powers. In *Clinton v. Goldsmith*, this Court relied upon the black letter law of Article 67, UCMJ,

when it determined that the CAAF did not have jurisdiction to act on a case. *Clinton*, 526 U.S. at 534. Applying this straightforward analysis to Petitioner's case, the CAAF could only act on cases "as affirmed" by the NMCCA. See Art. 66(c), UCMJ. Petitioner's case "as affirmed" by NMCCA held that he had waived his right to appeal an Article 10, UCMJ, speedy trial violation. Therefore, when the CAAF overturned the NMCCA's decision, the CAAF no longer had a case to review "as affirmed."

Also, a reliance on dicta circumvents the full review that Article 66(c) envisions for a service member. For example, although the NMCCA found, in dicta, that an Article 10 violation did not occur, a contrary finding, asserting a violation, would have been detrimental given that the NMCCA had already held that the issue was waived. Such a finding would have needlessly characterized the NMCCA to be impotent, despite its broad powers, in the face of an Article 10 speedy trial violation.

After the CAAF held that Article 10 could not be waived, the CAAF should have remanded the case to the NMCCA, which was unshackled by its prior erroneous holding, and in a position to conduct a proper Article 66(c) review regarding the Article 10, UCMJ, speedy trial issue.

CONCLUSION

Wherefore, the Petitioner respectfully requests that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

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APPENDIX A

United States v. Pratchard, 61 M.J. 279 (C.A.A.F. 2005).

UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES
DAILY JOURNAL
No. 05-173
Wednesday, June 15, 2005

APPEALS - SUMMARY DISPOSITIONS

No. 04-0707/MC. *U.S. v. Joshua J. PRATCHARD*. CCA 200301258. On further consideration of the granted issues, 60 M.J. 465 (C.A.A.F. 2005), and in view of our holding in *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005), we conclude that the United States Navy-Marine Corps Court of Criminal Appeals erred in finding that Appellant's guilty pleas waived the speedy trial issue under Article 10, Uniform Code of Military Justice, 10 U.S.C. § 810 (2000). However, upon a de novo review of the issue, we conclude, as did the court below, that the Appellant was not denied his Article 10 right to a speedy trial.

Accordingly, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CRAWFORD, Judge (dissenting in part and concurring in the result): I concur in the result only. See my separate opinion in *United States v. Mizgala*, 61 M.J. 122, 130-31 (C.A.A.F. 2005).

APPENDIX B

***United States v. Pratchard*, No. 200301258, slip op. (N-M.
Ct. Crim. App. May 18, 2004)**

**IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

**Charles Wm.
DORMAN**

C.J. VILLEMEZ

R.C. HARRIS

UNITED STATES

v.

**Joshua J. PRATCHARD
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200301258

Decided 18 May 2004

**Sentence adjudged 9 April 2002. Military Judge: R.C.
Harris. Review pursuant to Article 66(c), UCMJ, of General –
Court-Martial convened by Commanding General, 3d Marine
Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.**

**Capt ROLANDO SANCHEZ, USMC, Appellate Defense
Counsel**

Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION
DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant stands convicted of the wrongful use of methylenedioxymethamphetamine (ecstasy) and three specifications of the wrongful distribution of ecstasy, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The military judge, sitting as a general court-martial, sentenced the appellant to confinement for 3 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence and, in accordance with the terms of the pretrial agreement, ordered that confinement in excess of 30 months be suspended for a period of 6 months from the date the sentence was adjudged.

We have examined the record of trial, the appellant's two assignments of error, as well as the Government's response. We conclude that the findings and the sentence are correct in law and fact and, except as noted below, that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

In his first assignment of error, the appellant asserts that he was denied a speedy trial under Article 10, UCMJ. In his second assignment of error he seeks relief based on his assertion that the CA failed to list companion cases in his action. The Government argues waiver with respect to the first issue, and argues that the appellant has not demonstrated any prejudice with respect to the second.

Speedy Trial

Concerning the first assignment of error, we conclude that the appellant's unconditional guilty plea has in fact waived the issue he now seeks to raise. *United States v. Bruci*, 52 M.J. 750, 754 (N.M.Ct.Crim.App. 2000). We also find an affirmative waiver by the appellant concerning this issue contained in the record of trial. Record at 144.

Even if we did not conclude that the appellant's unconditional guilty pleas had waived consideration of the appellant's motion to dismiss under Article 10, UCMJ, we would not grant the relief requested. We review a military judge's denial of such a motion *de novo*. *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003). Applying this standard of review, we agree with the military judge that the appellant was not denied his right to a speedy trial.

Once an accused is placed in pretrial confinement, immediate measures must be taken to notify him of the charges against him and either bring him to trial or dismiss the charges. Art. 10, UCMJ. Although the Government is required to exercise reasonable diligence in bringing an accused to trial, proof of constant motion is unnecessary. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). On appellate review, we afford the factual findings of the military judge substantial deference, *see United States v. Dory*, 51 M.J. 464, 465 (C.A.A.F. 1999), and are required to consider: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. We should also consider such factors as: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial agreement; (2) was credit awarded for pretrial confinement on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the

appellant suffer any prejudice to the preparation of his case as a result of the delay. See *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999). Applying the above standards to the case at bar, we conclude that the appellant's Article 10, UCMJ, rights were not violated and that the military judge did not err in denying the appellant's motion to dismiss.

Companion Cases?

With respect to the appellant's second assignment of error, we concur with the Government that the appellant has failed to demonstrate any prejudice by the absence of any companion cases being listed in the CA's action. In his assignment of error, the appellant seeks either disapproval of the punitive discharge or a new CA's action, because the CA did not list the companion cases of Lance Corporals (LCpls) Polewski, Thompson, and Oakes.¹ Appellant's Brief of 24 Nov 2003 at 13. Based on our review of the record and the appellate pleadings, we are not able to determine whether these are in fact companion cases. The requirement to list companion cases applies only where the cases have been referred to trial by the same CA, and it is the appellant who has the burden of demonstrating the existence of companion cases. *United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000).

The appellant seeks to rely upon The Manual of the Judge Advocate General (JAGMAN), Judge Advocate General Instruction 5800.7C, § 0151a(2)(Ch-3, 27 Jul 1998), that requires CA's to list companion cases when acting on courts-martial. Specifically this provision provides that, "[i]n court-martial cases where the separate trial of a companion case is

¹ Although the appellant indicates that Thompson and Oakes are Privates, they are listed in the appellant's charge sheet as Lance Corporals.

ordered, the convening authority shall so indicate in his action on the record in each case." The purpose of this provision is "to ensure that the convening authority makes an informed decision when taking action on an accused's court-martial." *Ortiz*, 52 M.J. at 741.

We decline to grant relief for the following reasons. First, this JAGMAN guidance to convening authorities creates no right that is enforceable on appeal. *United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995). Second, we are confident that the CA made an "informed decision" in taking his action in this case, because he considered the record of trial, which specifically describes the involvement of LCpls Polewski, Thompson, and Oakes in the appellant's criminal conduct. Wing General Court Martial Order 11-02 of 3 Dec 2002 at 5. Third, the appellant has failed to show how he has been prejudiced in this case. *United States v. Watkins*, 35 M.J. 709, 716 (N.M.C.M.R. 1992); *see also Swan*, 43 M.J. at 792 (noting that even if error had occurred, the appellant failed to make "a colorable claim of prejudice resulting from such an omission," and was entitled to no relief). Finally, the appellant has failed to demonstrate that LCpls Polewski, Thompson, and Oakes were tried by a court-martial convened by the Commanding General of the 3d Marine Aircraft Wing.²

² In fact, the appellant introduced the pretrial statement of both Oakes and Polewski. Defense Exhibits A and B. In reviewing Defense Exhibit B, we note that Polewski is a military policeman, assigned to the Provost Marshal's Office, MCAS, Miramar. As such, it is doubtful that the Commanding General, 3d Marine Aircraft Wing, would have referred his case to trial.

7a

Conclusion

Accordingly, the findings and sentence, as approved by the CA, are affirmed.

For the
Court

R.H.
TROIDL
Clerk of
Court

Judge HARRIS did not participate in the decision of this case.

